70-5061

No. 6401

In the Supreme Court of the United States

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S BRIEF

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITIONER'S BRIEF

Opinion Below

The opinion of the Appellate Court of Illinois is reported at 121 Ill.App.2d 323, 257 N.E.2d 589 (1970).

Jurisdiction

The opinion and judgment of the Appellate Court of Illinois were entered on March 10, 1970. On October 5, 1970, the Supreme Court of Illinois denied leave to appeal. Petitioner filed his petition for certiorari on December 31, 1970, and this Court granted certiorari on May 24, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Question Presented

Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment identification which occurred at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 38, §103-4, Ill.Rev.Stat. 1969, provides in pertinent part:

> "Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. . . ."

STATEMENT OF FACTS

The Robbery of Willie Shard

On February 20, 1968, at 4:30 P.M., Willie Shard was walking along a street in Chicago, Illinois. (A. 18). He turned and noticed that two men were following fifteen feet behind him, but paid no attention to them. (A. 18, 26). As he turned to enter a restaurant, a man grabbed him from behind, while another man took from his pockets $140 in traveler's checks, about $30 or $35 in cash, his wallet, and all his identification cards. (A. 19, 26). The men then went one way and Shard went another. (A. 19). Shard returned to his apartment, but did not call the police. (A. 20). The next day he filed a complaint and gave the police a general description of the height, weight and complexion of the two men. (A. 20, 23).

Petitioner's Arrest

Two days after the [illegible]ry, at approximately 9:00 A.M., petitioner and Ralph Bean stepped into an alleyway to take a drink of alcohol. (A. 43). Bean testified that they found traveler's checks alo[illegible] various identification papers strewn upon the gro[illegible] 44).

Later that morning, at about [illegible]00 A.M., two Chicago police officers, Biaggio Panepinto [illegible] James Rizzi, were cruising in an unmarked squad car when they noticed petitioner and Bean. (A. 29, 33). Petitioner and Bean were doing nothing unusual, but Officer Panepinto recognized his partner that petitioner resembled a man [illegible] for

perpetrating a con game.* The officers then stopped the two men. (A. 11).

Officer Panepinto asked petitioner for identification but did not tell him why he had been stopped. (A. 7, 9, 12). When petitioner opened his wallet to produce his identification, the officer noticed traveler's checks bearing the name "Willie Shard." (A. 12, 34). When he asked petitioner to explain the checks, petitioner responded that they were "play money" and that he had won them in a crap game. (A. 12). Petitioner's companion, Ralph Bean, was also searched, and identification papers belonging to Shard were found on him. (A. 15). Petitioner and Bean were arrested and taken to the police station. (A. 6, 30).

The Showup Identification

After arriving at police headquarters, petitioner and Bean were interrogated. (A. 36). It is uncontroverted that they were not then advised of their right to counsel. (A. 16, 17).

On checking records, the officers first discovered that Willie Shard had been robbed two days earlier. (A. 31). The officers telephoned Shard and told him to report to the station to view two suspects. (A. 21, 24, 27). An officer picked up Shard and, after discussing with Shard the men who robbed him, drove him to the station. (A. 24). When Shard arrived at the station, several hours after petition-

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* The officers had a bulletin in the squad car which described the suspect as a male Negro, approximately 35 years of age, 5'2", 125 lbs., slender build, medium dark complexion. (A. 12). Petitioner was described by Officer Panepinto as approximately 5'5" in height. (A.13). It is undisputed that petitioner was not the man described in the bulletin.

er's arrest, petitioner and Bean, who are black, were seated at a table in a large squad room between Officers Rizzi and Panepinto. (A. 31, 37). The officers asked Shard if the two men were the robbers. (A. 24). Shard pointed to petitioner and Bean. (A. 24). No lineup was ever held, and the only means of identification was that just described.

During the several hours they were held at the police station, neither petitioner nor Bean was advised of his right to counsel. (A. 16, 17, 31). It was not until their arraignment on April 16, 1968, more than seven weeks after their arrest, and eight days after an indictment was returned against them, that the Public Defender was appointed to represent the two men. (A. 1).

The In-Court Identification

Prior to trial, petitioner and Bean moved to suppress the items recovered from the search of their persons and to suppress Shard's identification testimony. (A. 1, 4). Bean's motion to suppress the physical fruits of his search was granted. All other motions were denied.

Petitioner and Bean were tried together on August 1, 1968, and Willie Shard and the two arresting officers were the State's only witnesses. Shard testified that two men were walking about fifteen feet behind him just before the robbery, but that he had not noticed them. (A. 18, 26). Concerning the robbery itself, he testified that one of the men grabbed him from behind and another man went through his pockets. (A. 19, 26). He did not indicate which man grabbed him. He further testified that he was summoned to the police station on February 22 to identify petitioner and Bean. (A. 21, 27). He made no in-court identification independent of the station house confrontation. His testimony was only that the two men in

court were the same two men he identified at the police station. (A. 21).

Petitioner and Bean were both found guilty of the crime of robbery. (A. 2). Petitioner was sentenced to the Illinois State Penitentiary for a term of not less than five nor more than twelve years.* (A. 2).

SUMMARY OF ARGUMENT

Petitioner should have been advised of his right to counsel prior to the pre-indictment identification by Shard at the police station. The arrest occurred two days after the alleged crime had been committed. The "showup" occurred several hours after petitioner's arrest. There was no compelling reason which would have prevented the police from informing petitioner of his right to counsel so that a proper lineup could have been conducted. In *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that an identification confrontation is a critical stage in the criminal process at which counsel should be present. While the narrow facts of those cases involved post-indictment lineups, the reasoning of this Court in these decisions applies equally to the confrontation in the case at bar.

Because he was not advised of his right to counsel, petitioner was unable to object to the prejudicial circumstances surrounding his identification. The witness was asked

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* Bean's appeal, which was considered by the Illinois Appellate Court, together with petitioner's, resulted in reversal. Citing *Davis* v. *Mississippi*, 394 U.S. 721 (1969), that court held that his identification resulted from the unlawful seizure of his person, and suppressed all subsequent identifications, including the in-court identification. *People* v. *Bean*, 121 Ill.App.2d 332, 257 N.E.2d 562 (1st Dist. 1970).

by the police to point out the two men who robbed him. (A. 24). At that point the suspects were seated at a table in a large squad room between two police officers. (A. 37). There is no evidence that the witness at the time of the crime had a chance to view each man individually. By being asked to identify the two suspects together as was done in this case, the police increased the possibility that an innocent man would be mistakenly identified. In addition to the value of having counsel present to object to the lack of a proper lineup, the presence of counsel would have facilitated effective cross-examination at trial on the many inconsistencies in the witness' testimony.

It cannot be argued under the facts of this case that the presence of counsel would have prejudicially delayed the confrontation. Furthermore, Illinois law guarantees an accused the right to consult with an attorney immediately after his arrest. This right is in no way dependent upon the formality of whether an indictment has been returned.

The admission at trial of evidence of the unlawful confrontation falls squarely within this Court's *per se* exclusionary rule announced in *Gilbert* v. *California*, 388 U.S. 263, 272-273 (1967).

ARGUMENT

I.

A PRE-INDICTMENT CONFRONTATION IS A CRITICAL STAGE IN THE CRIMINAL PROCESS AT WHICH COUNSEL SHOULD BE PRESENT.

The constitutional right to assistance of counsel guaranteed by the Sixth Amendment to the Constitution and made obligatory upon the States by the Fourteenth Amendment, *Gideon* v. *Wainwright,* 372 U.S. 335, 342 (1963), requires that an accused be allowed counsel at all "critical" stages in the criminal process. *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932); *White* v. *Maryland,* 373 U.S. 59 (1963); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). In *United States* v. *Wade,* 388 U.S. 218 (1967), this Court held that an identification confrontation is a "critical stage" in the criminal process. This Court found that it was necessary to have counsel present at the identification confrontation, not only to objec to to irregularties, but also to assure that the accused is afforded his right to meaningful cross-examination of witnesses at trial. This reasoning applies equally to the case at bar.

Although the possibility for error in making an identification is great, identification testimony is probably the most persuasive and controlling of any evidence submitted to a jury.

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts

for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' Wall, Eyewitness Identification in Criminal Cases 26." *United States* v. *Wade*, 388 U.S. at 228-229.

The prejudice which results if counsel is not present at the confrontation stage of the criminal process was summarized by the Court in *Wade* as follows:

> "[N]either witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *United States* v. *Wade*, 388 U.S. at 230-232.

In *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that the rule announced in *Wade* was binding upon the states through the Fourteenth Amendment. The reasons requiring this Court to hold identification confrontations to be critical in *Gilbert* and *Wade* apply equally here.

This Court in *Wade* noted that the issue of guilt may for all practical purposes be determined at the identification confrontation:

> " '[I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " 388 U.S. at 229.

Petitioner's "guilt" was pre-determined at the pre-indictment held at the police station showup. The police made no attempt to conduct a lineup. For all practical purposes, the police told Shard that these were his assailants and would he please identify them. The failure to advise petitioner of his right to counsel prior to the showup undisputedly deprived him of a fair trial.

II.

THE ILLINOIS RULE THAT COUNSEL IS NOT REQUIRED AT PRE-INDICTMENT IDENTIFICATION CONFRONTATIONS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

In deciding whether petitioner should have been advised of his right to counsel prior to the showup, the Illinois Appellate Court felt bound by the Illinois Supreme Court's decision in *People* v. *Palmer,* 41 Ill.2d 571, 244 N.E.2d 173 (1969). In *Palmer,* the Illinois Supreme Court held that the right to counsel was limited solely to post-indictment confrontations:

> "The confrontation here was immediately following the defendant's arrest and prior to his indictment and the appointment of counsel, and the decisions in

Wade and *Gilbert* are not binding, even though the pretrial confrontation occurred after the date of those decisions." 41 Ill.2d at 573.

In reaching this conclusion that counsel is not required at pre-indictment showups, the Illinois Supreme Court ignored the rationale of this Court's decisions in *Wade* and its progeny. The reference in *Wade* to a "post-indictment lineup," 388 U.S. at 237, was descriptive of the facts of that case and was unrelated to this Court's reasons for its conclusion that Wade's counsel should have been advised of the confrontation. Nothing in *Wade* supports the approach, taken by the Illinois Supreme Court in *Palmer*, of characterizing the happenstance of the timing of an indictment as the critical factor in denying persons their constitutional right to counsel.

This Court expressly held in *Wade*:

> ". . . the principal of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." (388 U.S. at 227) (Emphasis by the Court.)

The overwhelming majority of state and lower federal courts have rejected the pre-indictment—post-indictment dichotomy adopted by Illinois.* This dichotomy is un-

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* E.g.: *United States* v. *Greene*, 429 F.2d 193 (D.C. Cir. 1970); *Rivers* v. *United States*, 400 F.2d 935 (5th Cir. 1968); *United States* v. *Phillips*, 427 F.2d 1035 (9th Cir. 1970); *United States* v. *Clark*, 289 F.Supp. 610 (E.D. Pa. 1968); *Commonwealth* v. *Guillory*, 254 N.E.2d 427 (Mass. 1970); *People* v. *Fowler*, 1 Cal.3d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969); *Palmer* v. *State*, 5

sound, both in its reasoning and practical application. In *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), the State argued that Escobedo had no right to call his attorney, prior to an in-custody interrogation, since he was not formally indicted. This Court stated

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." 378 U.S. at 486.

The State may not argue that this case is distinguishable from *Escobedo* because here the confrontation was held in the investigatory stage rather than at the accusatory stage of proceedings. The police investigation of Shard's robbery was no longer a general inquiry into an unsolved crime. Rather, the investigation had focused upon particular suspects who were in police custody. Indeed, Shard was called to the station to identify his robbers. (A. 24). There is no question that petitioner was in a critical stage of the criminal process while in police custody and awaiting an identification showup.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that before an individual may be interrogated by the police he must clearly be informed that he has a right to

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Md. App. 691, 249 A.2d 482 (1969); *People* v. *Hutton*, 21 Mich. App. 312, 175 N.W.2d 860 (1970); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738 (1970), cert. den. 400 U.S. 919 (1970); *State* v. *Isaacs*, 24 Ohio App.2d 115, 265 N.E.2d 327 (1970); *In Re Holley*, 268 A.2d 723 (R.I. Sup.Ct. 1970). The only other states besides Illinois which have recognized the post-indictment distinction are: *State* v. *Fields*, 104 Ariz. 486, 455 P.2d 964 (1969); *Perkins* v. *State*, 228 S.2d 382 (Fla. 1969); *Buchanan* v. *Commonwealth*, 210 Va. 664, 173 S.E.2d 792 (1970); and *State* v. *Walters*, 457 S.W.2d 817 (Sup.Ct. Mo. Div. 2, 1970).

consult with an attorney and to have the attorney present with him. The right to counsel prior to an identification confrontation is no less important to the preservation of justice than is the right to counsel prior to interrogation.

The Illinois legislature has provided that an accused has a right to consult with an attorney immediately upon arrest. Chapter 38, §103-4, Ill.Rev.Stat. 1969. Petitioner was never advised of this right. Neither this Court nor the Illinois legislature has predicated an accused's right to counsel upon whether an indictment has been returned. Under the reasoning of the Illinois Supreme Court, even though counsel may have been retained or appointed, unless a formal indictment has been returned, a defendant has no right to counsel at an identification confrontation.

The rule announced by the Illinois Supreme Court in *Palmer* provides incentive to the police to circumvent *Wade* by holding all identification confrontations prior to the accused's indictment. In fact, in cases where the only evidence against an accused is a witness' identification, it is probable that a pre-indictment confrontation may be more crucial than one held after witnesses have appeared before the Grand Jury and an indictment returned. In any event, the possibilities of prejudicial suggestion, of misidentification and of depriving an accused effective cross-examination at trial are critical at the pre-indictment stage.

No reason can be advanced for denying petitioner his right to counsel. This case involves no immediate on-the-scene confrontation—petitioner had been taken into custody and imprisoned in the police station for several

hours before the witness arrived to identify him.* During this long period of time, the police easily could have advised petitioner of his rights and secured counsel for him, without prejudicially delaying the confrontation. See *United States* v *Wade*, 388 U.S. at 237.

III.

THE PRESENCE OF COUNSEL AT THE IDENTIFICATION CONFRONTATION WAS CRUCIAL TO PETITIONER'S DEFENSE.

Petitioner's identification was patently arranged by the police. The police summoned Shard to the station to identify two suspects. (A. 27). A police officer picked up Shard, questioned him about his assailants, and then drove him to the station. (A. 24). When he entered the squad room, Shard saw petitioner and Bean seated at a desk next to the two arresting officers. (A. 24, 37).

> "Q. And did the police officers say anything to you?
> A. They asked me to point them out and I pointed them two guys out.
> Q. They asked you if these were the ones?
> A. Right.

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* Some courts have held that the requirements of *Wade* are excused in an immediate on-the-scene confrontation. E.g.: *Russell* v. *United States*, 408 F.2d 1280 (D.C. Cir. 1969), cert. den. 395 U.S. 928 (1970). Where the accused is found at the scene of the crime immediately after it occurred, the circumstantial character and immediacy of the encounter mitigate against the suggestiveness inherent in an encounter, as in the case at bar, specifically staged by the police at a later time.

Q. How many other people were sitting there?
A. I didn't pay much attention.
Q. They asked you if these two, Kirby and Bean were the ones?
A. Correct, yes." (A. 24-25).

This Court noted in *Wade* that an identification confrontation is particularly suggestive when "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail" or when "the suspect is pointed out before or during a lineup." 388 U.S. at 233.

In *Foster* v. *California,* 394 U.S. 440, 443 (1969), this Court found it highly suggestive that the suspect was exhibited to a witness under circumstances where he "stood out" and where the police repeatedly stated in effect, "*This* is the man."

Shard was asked to point out petitioner and Bean collectively as the two black men were seated together at a table with Officers Rizzi and Panepinto. (A. 24, 37). Under these facts, where the mode of identification was by means of a showup rather than a line-up, the presence of counsel was particularly necessary to preserve petitioner's rights. A showup has been described as "the most grossly suggestive identification procedure now or ever used by the police." Wall, Eye-Witness Identification in Criminal Cases, 28 (1965). Had counsel been present at the confrontation, he could have requested that the men be exhibited to the witness in an identification parade where the witness would have been required to identify each man individually.*

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* In *Stovall* v. *Denno,* 388 U.S. 293, 302 (1967), this Court recognized that the practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned. However, the only witness who could

Shard's in-court identification of petitioner was:

> "Q. [State's Attorney] When you went to the police station [on February 22, 1968] did you see the two defendants?
> A. [Shard] Yes, I did.
> Q. Do you see them in court today?
> A. Yes, sir.
> Q. Point them out, please.
> A. Yes, that one there and the other one. [Indicating]
> Mr. Pomaro: Indicating for the record the defendants Bean and Kirby.
> Q. And you positively identified them at the police station, is that correct?
> A. Yes." (A. 21)

This Court in *Gilbert* v. *California,* 388 U.S. 263 (1967), held that testimony by a witness at trial of the illegal identification confrontation is inadmissible *per se*:

> "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." 388 U.S. at 272-273.

Constitutional error was committed when petitioner was exhibited in a showup without being advised of his right to counsel, and again when Willie Shard testified at trial to the illegal showup. These errors deprived petitioner of a fair trial.

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identify Stovall was dying in the hospital and the Court held that the showing of Stovall alone to the dying woman was justified by compelling circumstances. In *Biggers* v. *Tennessee,* 390 U.S. 404 (1968), an equally divided court affirmed *per curiam* the conviction of a 16 year old youth who was exhibited singly to a witness at the police station. Whether or not a line-up is constitutionally required in the absence of compelling circumstances, it is clear that such suggestiveness as existed in the case at bar could have been eliminated if petitioner had been advised of his right to counsel.

CONCLUSION

This Court cannot, consistent with *Wade*, hold that counsel is required only at post-indictment identification confrontations. The formality of securing an indictment has no relationship to the requirement that counsel be present during police station identifications. Where the confrontation occurs two days after the crime and several hours after the accused has been taken into custody, and where no circumstances are shown that the presence of counsel would have prejudicially delayed the confrontation, the presence of counsel is constitutionally required. Were this Court to hold otherwise, it would effectively overrule *Wade*.

Petitioner respectfully prays that the decision of the Appellate Court of Illinois be reversed and this cause remanded with instructions ordering petitioner's release or that he be afforded a new trial at which all identification testimony is excluded.

Respectfully submitted,

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